COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops	)))))))	D.T.E. 03-59

MOTION OF DSCI AND INFOHIGHWAY FOR PARTIAL CLARIFICATION AND RECONSIDERATION OF ORDER CLOSING INVESTIGATION

Introduction

DSCI Corporation ("DSCI") and InfoHighway Communications Corporation ("InfoHighway") (collectively, the "Carriers") move for clarification and reconsideration, respectively, of certain findings within the November 25, 2003 "Order Closing Investigation" (the "Order") issued by the Department of Telecommunications and Energy ("Department"). The Carriers will not challenge the core decision not to seek a waiver of the national no impairment finding for enterprise customers served by unbundled local switching under the Federal Communications Commission's ("FCC") Triennial Review Order ("TRO").[1] Nevertheless, as discussed below, the Department

[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Aug. 21, 2003).

should review and modify the Order's findings on important post-impairment procedural issues.

First, the Order concluded based on limited argument[2] that the FCC possesses exclusive authority to resolve post-impairment pricing disputes.[3] This finding conflicts with the separate ruling that state commissions should resolve disputes between parties to interconnection agreements under 47 U.S.C. § 252, which can include pricing disputes.[4] The Department should clarify that it will still decide interconnection disputes over new post-impairment prices. Alternatively, given the importance of this jurisdictional issue to the public and to competitive local exchange carriers ("CLECs") that lose the right to TELRIC rates under the TRO and may need to challenge the propriety of the new Verizon rates, the Department should consider amending the Order to note the disagreement of Verizon and the Carriers on the jurisdictional question and reserve a final decision until a concrete dispute is presented to the Department for decision.[5]

Second, while the Order acknowledges the Carriers' belief that they will face customer-affecting outages resulting from Verizon's lack of adequate processes for transitioning the Carriers' customer bases to alternative arrangements, the Department

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2 As directed by the Department's September 26, 2003 Protective Order (the "September 26 Order"), the parties' pleadings focused on whether operational or economic impairment existed that would justify a waiver petition. The Carriers briefly raised the alternative argument relative to post-impairment pricing at the end of the October 15, 2003 Offer of Proof (at 18-20), and Verizon briefly addressed pricing issues in its October 27, 2003 Response (at 10-11). The Department's decision to terminate the docket without further investigation precluded full presentations of argument at this time.

3 Order at 19.

4 Order at 19-20.

5 A Hearing Examiner of the Maine Public Utilities Commission ("Maine Commission") took this approach in a recent proposal recommending that the Maine Commission not pursue an impairment waiver. See Examiner's Report, Investigation into Implementation of the FCC's Triennial Order, Nov. 15, 2003, at 9 (attached hereto as Exhibit A).

only offers the good offices of the Telecommunications Division to help solve these issues as they arise.[6] Given the size of the competitive marketplace served by the Carriers and similar DS-1 UNE-P CLECs, the outage-sensitive nature of many of their customers, and what are likely to be significant differences between CLECs and Verizon about the nature of Verizon's obligations post-impairment, the Department should reconsider the offer of only informal assistance. It should instead follow the instructive lead of the New Hampshire Public Utilities Commission ("New Hampshire PUC") by opening a formal docket to investigate and address transition issues faced by enterprise CLECs following the decision not to rebut the national no impairment finding.[7]

Factual and Procedural Background

On August 26, 2003, the Department opened the instant docket to investigate whether it should petition the FCC for a waiver of the presumptive national no impairment finding relative to unbundled local switching for enterprise customers. Following timely filings by the Carriers and another CLEC of initial "requests to proceed," the Department received participation requests from ten additional interested parties and the Attorney General. Following a procedural conference, the Department issued a Memorandum on September 26, 2003 that directed all docket participants seeking to challenge the FCC's presumptive no impairment finding to file an "offer of proof" setting forth "facts that would support a finding of impairment."[8] The

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6 Order at 20, n.17.

7 Order Closing Investigation of Impairment and Instituting a New Docket for Investigation and Facilitation of Transition Process, DT 03-174 (Nov. 10, 2003); see also Order of Notice, Investigation of the Transition of Competitive Local Exchange Carriers Whose Service Includes Switching at DS-1 Speed or Higher, DT 03-216 (Nov. 14, 2003).

8 See Order at 3; Procedural Memorandum at 1-2 (Sept. 26, 2003).

Department asked that the offer of proof include facts bearing on geographic markets to be considered in making the impairment decision, facts demonstrating the existence or nonexistence of impairment in such markets, and information to address Verizon's contention that the deployment of switches by competitive providers demonstrates that carriers are not impaired without unbundled local switching.[9]

On October 15, 2003, the Carriers filed a Joint Offer of Proof on DS-1 Switching Impairment (the "Offer"). The Offer established inter alia that the Carriers' UNE-P DS-1 customer base represented a substantial portion of the Massachusetts competitive business market; that Verizon has to date failed to respond to the Carriers' requests to develop procedures for transitioning customers to alternative, non-Verizon switching platforms (including a July 2003 face-to-face meeting among Verizon, DSCI and a facilities-based CLEC largely devoted to that issue); and Verizon's poor performance at installing and maintaining DS-1 UNE-P facilities made clear that Verizon cannot be trusted, without regulatory oversight, to handle the complex set of tasks associated with transitions absent development of coordinated procedures. Additionally, as an alternative request for relief in the event the Department elected not to pursue an impairment waiver with the FCC, the Carriers requested that the Department "require Verizon to retain its current rates for local circuit switching until the Department has determined the lawfulness of any replacement rates for local circuit switching no longer required to be made available as an unbundled network element pursuant to 47 U.S.C. § 251(c)(3)."[10]

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[9] Id.

[10] Offer of Proof at 5-6, 19-20.

On October 27, 2003, Verizon filed a response to the Offer ("Verizon Response"). Without disputing the facts raised by the Carriers in the Offer, the Verizon Response argued, based on the TRO text and regulations, that the absence of procedures for accomplishing a seamless transition of embedded customers did not constitute evidence of operational impairment as a matter of law. Additionally, it offered argument on the alternative post-impairment pricing issue, contending (as summarized in the Order at p. 14) that "the Department would not have jurisdiction to review the reasonableness of rates for Section 271 elements, because 47 U.S.C. § 271(d)(6) grants enforcement authority to the FCC to ensure that Verizon continues to comply with the market opening requirements of Section 271, not to the Department" (internal citations omitted).

On November 25, 2003, the Department issued the Order closing the instant investigation. The Department accepted the Carriers' arguments that Verizon had failed to cooperate in establishing any process for transitioning customers to CLEC-providing switching arrangements. Nevertheless, it agreed with Verizon's contention that such claims did not constitute operational impairment under the TRO and took no other action to address Verizon's refusal to respond to the Carriers' requests for establishing transition processes other than to note in a footnote that the Carriers may "request informal assistance from the Department's Telecommunications Division. . . ."[11] The Department addressed the alternative post-impairment pricing issues in the Order at 18-20. After noting the agreement of all parties that Verizon's prices would remain subject to a requirement under 47 U.S.C. § 271 that they not exceed "just and reasonable" levels, the Order concludes the Department "does not have jurisdiction to enforce Verizon's

[11] Order at 20, n.17.

unbundling obligations pursuant to Section 271. See 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligation is before the FCC. Id."[12] The Order, however, goes on to discuss that, post-impairment, CLECs and Verizon should pursue negotiations in accordance with applicable interconnection agreements and can bring any resulting disputes to the Department under 47 U.S.C. § 252.[13]

Clarification and Reconsideration Standards

The Department's standards for motions for clarifications and reconsideration are both well-settled. Clarification of a previously issued order is appropriate "when an Order is silent as to the disposition of a specific issue requiring determination in the Order, or when the Order contains language that is sufficiently ambiguous to leave doubt as to its meaning."[14] Clarification "does not involve reexamining the record for the purpose of substantively modifying a decision."[15]

A motion for reconsideration "should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered" and "should not attempt to reargue issues considered and decided in the main case."[16] A reconsideration motion "may be based on the argument that the Department's

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12 Order at 19.

13 Order at 19-20.

14 Order on Motion of Verizon for Reconsideration and Clarification, Et al., Investigation as to the Propriety of Rates and Charges Set Forth in M.D.T.E. Nos. 14 and 17, DTE 98-57 – Phase I (May 21, 2001) at 14 (internal citations omitted).

15 Id. at 14-15 (internal citations omitted).

16 Id. at 13 (internal citations omitted).

treatment of an issue was the result of mistake or inadvertence." [17] The Department has granted reconsideration in proceedings without evidentiary hearings where the decision addressed issues that were decided not fully identified in procedural rulings.[18]

ARGUMENT

I. THE DEPARTMENT SHOULD CLARIFY ITS FINDINGS REGARDING STATE COMMISSION AUTHORITY OVER POST-IMPAIRMENT PRICING DISPUTES.

Clarification is needed regarding the Department's authority to review Verizon's prices, terms and conditions for unbundled network elements ("UNEs") that will be offered to CLECs once the obligation to offer UNEs at regulated TELRIC rates expires in accordance with the terms of the TRO. The Order's statement that the FCC has exclusive jurisdiction over post-impairment prices conflicts with the Order's separate statement that carriers can pursue interconnection disputes (including over pricing) with the Department under 47 U.S.C. § 252, as follows.

The determination of whether a rate is just and reasonable is squarely within the responsibility and jurisdiction of the Department. State commissions are responsible for establishing the rates in interconnection agreements and Verizon must offer Section 271 checklist items in an interconnection agreement.[19] Paragraph 656 of the TRO provides that Section 271 checklist items must continue to be unbundled and that the rates for such

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17 Id. at 14 (internal citations omitted).

18 Interlocutory Order on Bell Atlantic Motion for Reconsideration or, in the Alternative, for Clarification, and Motion for Stay of Order, Petition of CTC Communications Corp. for Emergency Relief with Respect to the Alleged Actions and Omissions of Bell Atlantic, DTE 98-18-A (July 1998) at 8-10; see also May 21, 2001 Order, DTE 98-57-Phase I, supra at 31-32 (reconsideration granted where party did not have sufficient notice that issue would be decided).

19 See 47 U.S.C. § 271(c)(2)(A).

elements must be "priced on a just, reasonable and not unreasonably discriminatory basis."

While the FCC can provide guidance, setting the rate itself is the job of the state commission. The United States Supreme Court affirmed this in AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, at 384 (1999).

> "…252(c)(2) entrusts the task of establishing rates to the state commissions. We think this attributes that task a greater degree of autonomy than the phrase 'establish any rates' necessarily implies. The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set in 252(d). **It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.** That is enough to constitute the establishments of rates." (Emphasis added.)

In this instance, the FCC has provided the guidance that the rates for "de-listed" Section 271 checklist items must comply with the traditional "just and reasonable" standard found in many state statutes and, for interstate services, Sections 201 and 202 of the federal Communications Act. The TRO expressly states:

> "Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewing utilizing the basic just, reasonable and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal **and state statutes**, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements."[20]

[20] TRO, ¶ 663 (emphasis added; footnotes omitted).

Thus, the new rule for pricing non-251 UNEs is the "just and reasonable" standard but that does not change who applies the rate (which is the state). Verizon argues that the FCC has reserved post-impairment pricing and terms and conditions determinations to itself alone and only in Section 271 enforcement proceedings under 47 U.S.C. § 271(d)(6).[21] But the FCC did not say that – in fact it relied expressly on federal law and state law, citing Sections 201 and 202 as an example of the "just and reasonable" standard. The process described in paragraph 664 is no different from how the FCC reviews any state-set rates under the Telecommunications Act. For instance, the state sets the TELRIC-based UNE rates and the FCC reviews them in an initial 271 application (or retains the authority to review them in an enforcement action under 271(d)). This case is no different. Here, the state approves a rate as "just and reasonable" in the context of an interconnection agreement dispute that would be brought to the Department's attention under 47 U.S.C. § 252 (as the Order acknowledges at 19-20), and the FCC would retain the ability to review it in an enforcement proceeding. But the first step is for the state commission to review and approve the rate according to the standard adopted by the FCC.

This Department and the FCC also hold concurrent jurisdiction over post-impairment pricing issues raised in connection with interconnection agreements. The FCC did not explicitly reserve exclusive jurisdiction to review "just and reasonable" rates for Section 271 checklist items, and therefore the state's jurisdiction remains intact. This is particularly true where the FCC is already an overburdened agency that is ill-

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[21] Verizon Response at 10-11, citing TRO, ¶ 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a [Bell Company's] application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)").

positioned as a matter of resources or expertise in local conditions to conduct reviews of post-impairment pricing disputes that depend on local conditions in each of the 50 states. Furthermore, it is inconceivable that the FCC intended to deprive local commissions of jurisdiction over pricing without extensive discussion in the TRO. This is especially true where the potential result could be the death knell of competitive options at the state level caused by excessive ILEC rates that remain in place for months or years pending a decision by the federal agency.

Accordingly, the Department should clarify that it retains authority to decide post-impairment pricing disputes brought to it in connection with interconnection arbitrations, as discussed in the Order at 19-20. Given the importance of this issue to Verizon, the Carriers, and all other CLECs that will challenge Verizon's rates post-impairment in the upcoming months and years in docket DTE 03-60, the Department alternatively should consider changing the Order to note the existence of a dispute over the extent of the Department's jurisdiction over interconnection agreement pricing issues and reserve a conclusive ruling until such time as a petition raising the issue is filed with it under 47 U.S.C. § 252.[22]

II. THE DEPARTMENT SHOULD RECONSIDER ITS OFFER OF INFORMAL ASSISTANCE AND OPEN A NEW DOCKET TO ADDRESS POST-IMPAIRMENT TRANSITION ISSUES.

As the Order itself acknowledges (at 8-9), the Carriers' Offer of Proof contained substantial and unrebutted evidence that Verizon has failed to date to cooperate with the Carriers to develop procedures and policies that would govern the relations between

[22] The Carriers note that the September 26 Order requested parties to make offers of proof on impairment issues and did not require presentation of evidence or argument on post-impairment pricing issues. Thus, the September 26 Order does not require a Department ruling on the pricing issues at this time.

Verizon and enterprise CLECs following a decision by the Department not to pursue an impairment case at the FCC. UNE-P CLECs have expressed a very strong preference for development of a DS-1 hot cut process that would allow them to keep their existing Verizon loops (for which they have already paid non-recurring charges at the outset of UNE service) and utilize CLEC-provided switching, thereby avoiding the need for the excessive cost and economic waste associated with the installation of entirely new facilities that (1) might not be available at all, (2) might not match the current service requirements of the customer in precise detail, placing the customer out of service until a new facility can be installed in a matter of weeks, if at all; and (3) may well lead to loss of the customer entirely, as Verizon can bring the customer back to Verizon retail by means of a simple and cost-free records change. Verizon has failed to respond to this request at all, apparently hoping to benefit from the chaos that will ensue if the Carriers find unacceptable Verizon's post-impairment prices and are forced to submit en masse orders for alternative serving arrangements.

The Order (at 20, n.17) acknowledged the likelihood of post-impairment service disruptions to the Carriers' customers and offered the good offices of the Telecommunications Division to help resolve such problems as they arose. While helpful, that is unlikely to be sufficient given the size of the Massachusetts DS-1 UNE-P market that is at risk of disruption and loss based on Verizon's post-impairment actions. Furthermore, although it was not required to be addressed in the September 26 Order requiring evidence on the impairment issues, the Carriers and Verizon have significant differences of opinion regarding Verizon's obligations under the TRO post-impairment. The issue of how best to proceed was not a focus of the Carriers' Offer or the Verizon

Response, and the Department should not hesitate to reconsider the reliance on informal resolution approaches adopted in the Order.

Accordingly, the Carriers request that the Department reconsider its decision to rely exclusively on informal staff assistance and instead, follow the lead of the New Hampshire PUC and open a docket to consider and resolve issues raised by transitions from current serving arrangements to continued UNE service at post-impairment prices, terms and conditions or, alternatively, transitions to alternative serving arrangements.[23] Given the relatively short period established in the TRO for Verizon to implement new prices and Carriers to decide whether to remain on Verizon's network or move to alternative servicing arrangements, opening a docket will provide needed regulatory oversight to the potentially disruptive post-impairment transition process.

[23] See New Hampshire PUC Order in docket DT 03-174 (attached hereto as Exhibit B); see also Order on Motion for Reconsideration, Petition of Cape Light Compact for Approval of a Municipal Aggregation Service Pilot Project, at 10; DTE 01-63-A (November 20, 2001) at 8 (taking into account intervening agency decision in deciding that reconsideration is warranted).

CONCLUSION

For the reasons stated above, the Department should review its November 25, 2003 Order Closing Investigation and (1) clarify that interconnection disputes involving pricing can continue to be reviewed by the Department or, alternatively, modify the Order to note the jurisdictional dispute and reserve a decision if and when an actual case is presented to the Department for decision; and (2) open a docket to review transition issues that will result from the Department's decision not to seek to rebut the national no impairment finding for enterprise customers.

Respectfully submitted,

DSCI and INFOHIGHWAY

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